No. 86-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN R. VAN DRASEK,

Petitioner,

—v.—

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND VIETNAM VETERANS OF AMERICA IN SUPPORT OF THE RESPONDENT

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The American Civil Liberties Union and Vietnam Veterans of America respectfully move for leave to file a brief, annexed hereto, as Amici Curiae in this case.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members. The ACLU is dedicated to preserving and protecting the rights secured by the Constitution. Since its inception, the ACLU has participated in litigation to safeguard and to implement the guarantees of the Bill of Rights for all Americans, including those who serve the nation in the armed forces.

Vietnam Veterans of America (VVA) is the largest national organization devoted exclusively to representing the needs and interests of veterans who served in the United States armed forces during the Vietnam era. VVA's over 35,000 members, in 300

chapters throughout the United States, all served on active duty during the Vietnam era. Many of them remain on active duty in the armed forces today, serve in the reserve components, or are retired for disability or longevity. All have been and many still are, subject to the Uniform Code of Military Justice.

VVA was founded to improve the physical, legal, social and economic well-being of Vietnam veterans. It has long promoted legal efforts to assist veterans to obtain job training, health care, and disability benefits. In addition to representing veterans before the Board of Veterans Appeals, military Discharge Review Boards, and the Boards for the Correction of Military Records, VVA has participated in litigation to assist veterans on many issues. It has appeared as amicus curiae in several cases before this Court and the United States Court

of Military Appeals.

It is therefore respectfully requested that the Amici be granted leave to file this brief amicus curiae in the hope that it will assist the Court's resolution of this case, which raises important questions dealing with the ability of members of the armed forces to vindicate rights secured under the Constitution, the Uniform Code of Military Justice (UCMJ), and regulations implementing the UCMJ.

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INTEREST OF AMICI

The Statement of Interest of Amici is contained in the Motion for Leave to File a Brief Amicus Curiae.

STATEMENT OF THE CASE

Petitioner Captain John Van Drasek had an exemplary and unblemished service record until he spoke out concerning his commanding officer's violations of Marine Corps regulations barring employment discrimination against women, and voted on Administrative Discharge Board (ADB) cases contrary to the position preferred by his commanding officer. Immediately in the wake of each of these activities -- not only constitutionally protected and lawful of themselves, but also intended to promote lawful and proper decisions by the service -- Captain Van Drasek suffered a series of career set-backs, each traceable to an adverse action by the commanding officer in question, that led ultimately to the forced conclusion of the military career to which he had devoted his adult life.

In October, 1981, Captain Van Drasek challenged the exclusion by his commanding officer, Colonel M.T. Cooper, of pregnant marines from courses at the NCO Leadership School at Quantico, Virginia, of which Van Drasek was Director. Col. Cooper's directives contravened the Marine Corps Equal Opportunity Manual, MCO P5354.1. Shortly thereafter, Col. Cooper filed a fitness report on Captain Van Drasek for this period in which Van Drasek received, for the first time in seven years, no ratings of "outstanding," which were necessary to his continued advancement in the service. The April, 1982 Major selection board passed him over for promotion, for the first time in his military career, in light of the ratings.

On May 18, 1982, Captain Van Drasek proposed regulations for the forthcoming NCO Leadership School academic year that would have formally echoed the Marine Corps ban on

discriminatory treatment of pregnant Marines. Van Drasek's proposed regulation was ignored in favor of one barring pregnant Marines from the School, again in direct contravention of the Corps' equal opportunity standards. Shortly thereafter, Col. Cooper filed a second, similar fitness report on Captain Van Drasek, with a similar, but more devastating, effect: Captain Van Drasek was again passed over for promotion. This second pass-over, however, meant his mandatory separation from military service.

Finally, in the summer of 1982, several months prior to the final pass-over decision, Captain Van Drasek, while serving an appointment on an ADB, joined a unanimous vote to retain a Marine implicated in a drug abuse case; Col. Cooper that very day ordered Van Drasek's removal from a subsequent case shortly thereafter. Soon after that, Captain Van Drasek again voted with a unanimous board

in recommending an honorable discharge for another Marine. Col. Cooper that very day ordered Van Drasek transfered away from the Officer Candidate School at Quantico, a move extremely detrimental to Van Drasek's chances of promotion.

As a result of all these actions, Captain Van Drasek brought an Article 138 Complaint of Wrongs against Colonel Cooper. Although finding that many other officers felt threatened by Cooper with the same pressures and actions that Van Drasek alleged, the investigating officer did not resolve the complaint in Van Drasek's favor. Following the second pass-over, in March, 1983, Van Drasek filed the instant action on June 17, 1983. The parties agreed to stay the district court action pending resolution of Captain Van Drasek's appeal to the Board for Correction of Naval Records (BCNR). Despite finding that Van Drasek's

transfer may well have improperly resulted from his votes on the ADB, and questioning Col. Cooper's judgment and fairness, the BCNR declined to take any action favorable to Captain Van Drasek, in part because it did not believe it had subject matter jurisdiction.

On December 6, 1983, the District Court for the District of Columbia dismissed Van Drasek's Article 138 complaint for lack of jurisdiction. Following transfer on May 31, 1985 from the United States Court of Appeals for the District of Columbia Circuit, the Court of Appeals for the Federal Circuit affirmed the dismissal on January 23, 1986, for the reasons stated in the district court opinion. Following denial of rehearing, Captain Van Drasek petitioned this Court for certiorari.

Captain Van Drasek asserts that the biased fitness reports, ultimately fatal to

his career, filed by his commanding officer and the improper "command influence" exerted over his status on the ADB violated several statutes, 10 U.S.C. § 837 (improper command influence); id. § 938 (investigation and redress of wrongs alleged by service members); and service regulations, MCDEC Order 5210.13C, 5210.1 (orderly transfer of personnel); SECNAVINST 1420.1, p.4, paras. 5(g)(3), 5(i)(2). In addition, Captain Van Drasek alleges that these actions chilled his first amendment right of free speech and constituted a deprivation of property in violation of the due process clause of the fifth amendment; and that the Article 138 Complaint investigation violated the due process clause of the fifth amendment.

SUMMARY OF ARGUMENT

Both the prior decisions of this Court and the mandate of the Congress make clear that federal courts have jurisdiction to review violations of constitutional, statutory, or regulatory authority by the military. The only question here presented is whether claims properly raised through Article 138 proceedings or before the various Boards for the Correction of Military (or Naval) Records fall outside this settled proposition.

It would defy both logic and fundamental fairness to hold that such complaints may not be afforded judicial review. Courts have consistently held that they should properly defer jurisdiction until have administrative remedies -- such as Article 138 and BCMR or BCNR proceedings -- have been exhausted. It is well settled that BCMR or BCNR actions are

reviewable in federal court. Furthermore, Article 138 complaints are properly reviewable before the BCMR or BCNR. Given that, it makes no sense to hold that members of the military who pursue intra-service remedies as required for judicial review cannot obtain such review because they are appealing from those very proceedings.

Furthermore, Congress clearly intended such administrative determinations, even by military departments, to be judicially reviewable under the Administrative Procedure Act. The only relevant exceptions to the APA's reviewability requirement are for "courts martial" and "military commissions," neither of which are applicable here. In fact, Article 138 procedures, established by Congress, are structured to facilitate judicial review. While there may be instances that counsel against judicial intervention into circumstances involving

particular military expertise and requiring special military autonomy, there is no need for, nor did Congress intend, a per se bar to federal court jurisdiction over appeals of the sort presented here.

The federal courts have an important role to play in ensuring that our armed forces, as much as any other instrumentality of our Government, comply not only with the Constitution, but with the statutes enacted by Congress in exercising its constitutional responsibility for the military, and with the administrative regulations established by the services themselves. Amici urge this Court to reaffirm the principle that the district court in this case may and should assert jurisdiction to hear Captain Van Drasek's claims.

ARGUMENT

PROCEEDINGS BROUGHT UNDER ARTICLE 138 ALLEGING VIOLATIONS OF CONSTITUTIONAL RIGHTS, STATUTORY AUTHORITY, OR THE MILITARY'S OWN REGULATIONS ARE REVIEWABLE BY THE FEDERAL COURTS

A. The Federal Courts Have Jurisdiction to Review Violations of Constitutional, Statutory, or Regulatory Authority by the Military Departments.

This case raises a simple, but important, question: Will our courts continue to ensure that the military comply with the commands of the Constitution, of Acts of Congress, and of their own regulations?

The decisions of this Court, and the mandate of the Congress, make it clear that the answer should be "yes."

The claims raised by Captain Van Drasek -- violation of the constitutionally secured right to due process of law and to freedom of speech, as well as violation of various federal statutes and administrative

regulations -- are not only serious and substantial, but also are precisely the types of claims that the federal courts have always stood open to review even in the military context.

This Court "has never held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." Chappell v. Wallace, 462 U.S. 297, 304 (1983) (citing Brown v. Glines, 444 U.S. 348 (1980); Parker v. Levy, 417 U.S. 733 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973)); see also Harmon v. Brucher, 355 U.S. 579 (1958); Dilley v. Alexander, 603 F.2d 914, 920 (D.C. Cir. 1979); Huff v. Secretary of the Navy, 575 F.2d 907, 911-14 (D.C. Cir. 1978), rev'd on other grounds, 444 U.S. 453 (1980) (per curiam); Martin v. Secretary of the Army, 455 F. Supp. 634, 638 (D.D.C. 1977); Cushing v. Tetter, 478 F. Supp. 960,

965 (D.R.I. 1979).

Redress is also available in the federal courts for wrongs that do not rise to the constitutional level: While "[a] member of the service who thinks that his commander has misapplied . . . regulations can seek remedies within the service" such as filing an Article 138 Complaint, "the federal courts are open to assure that, in applying the regulations, commanders do not abuse the discretion necessarily vested in them." Huff, 444 U.S. at 457 n.5.

"It is established beyond peradventure that the military, like any other agency, is bound by its own regulations." Martin, 455 F. Supp. at 638. Therefore, "[i]t is the duty of the federal courts to inquire whether an action of a military agency conforms to the law, or is instead arbitrary, capricious, or contrary to the statutes and regulations governing that agency." Dilley v. Alexander,

603 F.2d at 920 (citations omitted).

B. Article 138 Complaints Logically Fall Within the General Rule of Reviewability.

In Chappell, this Court directed that grievances by military personnel be presented pursuant to 10 U.S.C. § 938 (Article 138 complaint) and § 1552(a) (review by the Board for the Correction of Naval Records), and stated that BCNR determinations are subject to judicial review. 462 U.S. at 303 (citing Grieg v. United States, 640 F.2d 1261 (Ct. Cl.), cert. denied, 455 U.S. 907 (1981); Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979). While the analogous question of reviewability of Article 138 complaints was not presented in that case, there is no reason to think that the answer should be any different. In its reply brief in Huff, in fact, the Government conceded that, following the unsatisfactory disposition of an Article

138 complaint, "[f]urther review of the commander's decision may also be obtained by filing an action in federal district court. See Cortright v. Resor, 447 F.2d 245, 250-255 (2d Cir. 1971), cert. denied, 405 U.S. 965 (1972)." Reply Brief for Petitioners, Secretary of the Navy v. Huff, supra, at 1-2.

The individual interests that Congress sought to secure in creating Article 138 proceedings have been recognized by courts and commentators as highly significant.

> The right to seek redress of wrongs is an integral part of the complex of rights granted by the Congress to those subject to military law. Those to whom an application for relief under the provisions of this Article is submitted may not lightly regard the right it confers, nor dispose of such application in a perfunctory manner. Its provisions should not be construed by those charged with the administration of military justice, at any level, in a manner calculated to lead anyone to believe that the right of redress of wrongs is of minor importance and one which may be disregarded entirely or perfunctorily complied with.

Tuttle v. Commanding Officer, 21 U.S.C.M.A. 229, 230, 45 C.M.R. 3, 4 (1971). The logic of this Court's, and other courts', holdings makes manifest that the disposition of the individual interests Congress sought to safeguard under Article 138 are properly reviewable by the federal courts.

To hold otherwise would be to subject Captain Van Drasek, the only officer of his rank with Vietnam combat experience, to two "catch-22's" worthy of Yosarian's army: First, Captain Van Drasek would have been required to pursue Article 138 and BCNR relief before proceeding in federal court, see, e.g., United States ex rel. Berry v. Commanding General, 411 F.2d 822 (5th Cir. 1969) (on principles of comity, civilian court should not take jurisdiction where appellants failed to exhaust procedure available in military justice system); cf. Chappell v. Wallace, 462 U.S. at 303 n.1

(suggesting that "exhaust[ing] administrative remedies" -- such as Article 138 -- is necessary precedent to BCNR review, which is then "subject to judicial review" in federal court) -- only to find that his grievances were unreviewable once brought as an Article 138 complaint.

Second, while the Article 138 allegations would have been reviewable by the district court had the BCNR itself reviewed the Article 138 proceedings, Chappell, 462 U.S. at 303; Powell v. Marsh, 560 F. Supp. 636 (D.D.C. 1983); Heisig v. Secretary of the Army, 554 F. Supp. 623 (D.D.C. 1982); see also 5 U.S.C. § 704, any violations of due process and of the military's own regulations that resulted from the inadequate Article 138 investigation and the BCNR refusal to review it would bar vindication of the petitioner's rights precisely because of the BCNR refusal to review it. Cf. Baxter v. Claytor, 652

F.2d 181 (D.C. Cir. 1981) (where BCMR improperly declined jurisdiction, federal court took jurisdiction to order appropriate review of complaint by BCMR).

C. Congress Provided in the Administrative Procedure Act for Federal Court Review of Such Administrative Determinations by the Military Departments.

Such a result flies in the face of not only logic, but also the intent of the Congress and this Court's prior rulings. Persons aggrieved by a final agency action are presumed to be entitled to judicial review of the administrative decision unlesss there is "persuasive reason to believe" Congress intended to preclude review. Morris v. Gressette, 432 U.S. 491, 501 (1977); Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967). Before denying review, a court must find evidence of "a specific congressional intent" to bar review. Banzhaf

v. Smith, 737 F.2d 1167, 1169, 1170 (D.C. Cir. 1984) (en banc). "[W]here substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." Block v. Community Nutrition Inst., 467 U.S. 340, 351 (1984). Block identified certain factors -- including "specific language or specific legislative history" -- that are probative indicia of congressional intent to preclude review. Id. at 2456. But as this Court more recently made clear, Block did not repudiate the long line of prior Supreme Court cases requiring that Congress clearly manifest such an intent to deny review. See Lindahl v. OPM, 470 U.S. ___, ___, 84 L.Ed.2d 674, 684 (1985).

Congress has manifested no such intent as regards Article 138 proceedings. In fact, it has indicated just the opposite.

> The APA does not exclude the military departments per se from its coverage. The APA applies to each "agency," which is defined as "each authority of the Government of the United States. . .." Although sections 551 and 701 exclude certain military activities from their definition of "agency," and thus from almost all APA coverage, they deliberately do not exclude the military departments as organizations.

Folk, The Administrative Procedure Act and the Military Departments, 108 Mil. L. Rev. 135, 136-37 (1985).

As the APA's legislative history explains: "[I]t has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. Thus certain war and defense functions are exempted but not the War or Navy Departments in the performance of their functions." Senate Comm. on Judiciary, Administrative Procedure Act Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 191 (1947).

Thus, "[c]ourts considering the question

have found the APA applicable to the military departments except to the extent the APA specifically exempts certain of their functions." Id. "Although the Supreme Court has not addressed the issue directly, it has become widely accepted that the Act does apply to the military." Peck, The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities, 70 Mil. L. Rev. 1, 25 (1975).

The only exception to the APA's requirement of amenability to judicial review applicable to the military is for "courts martial and military commissions," as well as "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. § 552. The latter provisions are inapplicable here. As for the former, as the Defense Department's own legal journal states, "[n]either the APA nor its legislative history defines the terms 'courts

martial [sic]' or 'military commissions.' However, under common usage, these terms have a well understood and limited meaning." Folk, supra, 108 Mil. L. Rev. at 137 (footnotes omitted). Thus, a court-martial is

> a court of military or naval personnel for the trial of offenses against military law or the law of war, the formalities prescribed for convening courts-martial by the Uniform Code of Military Justice, the Manual for Courts-Martial, and regulations make it virtually impossible to confuse a court-martial with another type of military tribunal.

Id. at 137-38. "Military commissions," in contrast, "are far less common in military practice but still have a narrow function similar to that of a court-martial." Id. at 138. Such commissions are

> convened by military authority for the trial of persons not usually subject to military law who are charged with violations of the laws of war; and in places subject to military government or martial law, for the trial of such persons when charged with violations of proclamations, ordinances, and valid domestic civil and criminal

law of the territory concerned. Id. (quoting U.S. Dep't of Army, Reg. No. 310-25, Military Publications -- Dictionary of United States Army Terms, at 168 (Sept. 15 1975)); see also Madsen v. Kinsella, 343 U.S. 341, 345-47 & n.9 (1952) "in our military law, the distinctive name of military commission has been adopted for the exclusively war-court").

Article 138 proceedings clearly do not fall into these exceptions to reviewability. As implemented by Ch. XI, Manual of the Judge Advocate General Section 1101-14, Article 138 provides for a "court of inquiry" or "board of officers," which are mere advisory boards to the investigating officer who must "arrange to be advised of the results of the consideration of the complaint" by such bodies, and upon receipt of such advice, "shall complete his consideration of the complaint in light thereof, and shall

proceed" to forward the complaint for redress by proper authority. JAGMAN § 1104(a). It is this officer who retains primary jurisdiction to act upon the complaint, not the "court of inquiry" or the "board of officers;" such an officer, acting in an administrative capacity, certainly does not constitute a "military commission" or "court-martial." That the Court of Military Appeals also believes Article 138 proceedings to be amenable to judicial review is implicit in its statement that

> since that officer is required to report fully his disposition of the matter to the Secretary concerned, a record is thus prepared and preserved for judicial consideration, in the event his ruling is adverse to the applicant. Thus, a sound basis for judicial determination is obtained.

Tuttle v. Commanding Officer, 21 U.S.C.M.A. at 230, 45 C.M.R. at 4 (emphasis added). Finally, the military itself treats Article 138 proceedings consistently with the Freedom

of Information Act requirement that agencies that adjudicate must make the records of such adjudications available to the public, by indexing and making available for copying all denials of Article 138 complaints. See Folk, supra, 108 Mil. L. Rev. at 155 (citing settlement in Hodge v. Alexander, Civil No. 77-228 (D.D.C. May 13, 1977)).

The district courts in this case and in Moore v. Schlesinger, 384 F. Supp. 163 (D. Colo. 1974), were clearly incorrect, then, in concluding that Article 138 proceedings "are expressly excluded from [APA review by] 5 U.S.C. Section 701(b)(1)(F)." Moore, 384 F. Supp. at 166.

In contrast, the vast majority of courts that have addressed this issue have found that the federal courts may indeed take jurisdiction in the case of Article 138 complaints. See Colson v. Bradley, 477 F.2d 639 (8th Cir. 1973); United States ex rel.

Barry v. Commanding General, 411 F.2d 822 (jurisdiction retained); Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971) (same); Turner v. Calloway, 371 F.2d 188, 190-91 (D.D.C. 1974) ("jurisdiction [of Article 138 complaint] should be retained"); McKay v. Hoffman, 403 F. Supp. 467 (D.D.C. 1975) (jurisdiction retained); Allen v. Monger, 404 F. Supp. 1081 (N.D. Cal. 1975) (same).

> [I]t [is] clear that the civil courts may review any constitutional challenge to administrative activities of the military, not just those involving due process.... [I]t has been even more firmly established that civil courts may review military administrative actions challenged for violation of the Constitution, statutes, or regulations primarily for the protection of the individual.

Peck, supra, 70 Mil. L. Rev. at 56-57 (emphasis in original).

The federal courts recognize the need not to rush in and interfere with military decisions when such civilian judicial

intrusion would be unnecessary or detrimental to the special needs of the military. Thus, many courts have, for instance, adopted a fairly restrictive test, very protective of military autonomy, known as the Mindes test, see Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). See, e.g., Trerice v. Pedersen, 769 F.2d 1398 (9th Cir. 1985); Williams v. Wilson, 762 F.2d 357 (4th Cir. 1985); Navas v. Gonzalez-Vales, 752 F.2d 55 (1st Cir. 1984); Gonzalez v. Department of the Army, 718 F.2d 926 (9th Cir. 1983). Its stringency, and the standards it sets for avoiding interference with military functions traditionally committed to the discretion of the services, demonstrate that workable standards exist short of a per se bar to district court jurisdiction over appeals from Article 138 complaints and BCMR reviews. As demonstrated in the foregoing argument, moreover, such a wholesale declaration of

unreviewability would fly in the face of this Court's prior decisions and reasoning, as well as the clear intent of Congress that Article 138 complaints be subject to judicial review.

Captain Van Drasek here alleges significant violations of his rights and of the standards laid down for the military by Congress and by the Navy itself. Federal court review here would not interfere with the military's proper and normal functioning; in fact, it would ensure and foster that goal.

CONCLUSION

For the reasons stated, the decision below should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted,

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